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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOHNNY ALBA, Plaintiff and Respondent, v. FINTON ASSOCIATES, INC., Defendant and Appellant.	B148053 (Los Angeles County Super. Ct. No. BC 208338)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rodney E. Nelson, Judge. Affirmed.

Hill, Farrer & Burrill and James R. Evans, Jr., for Defendant and Appellant.

Lanak & Hanna, Craig P. Bronstein and Jennifer M. Schildbach for Plaintiff and Respondent.

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In this action for breach of contract and common counts, subcontractor Johnny Alba, doing business as Alba Plastering (respondent), prevailed in a court trial against general contractor Finton Associates, Inc. (appellant). Appellant contends the court erred when it based its damage award on evidence that related to subcontracts other than the one the parties had entered for exterior plastering services, incorrectly awarded prejudgment interest, and abused its discretion in the amount of attorney fees granted. We affirm the judgment.

PROCEDURAL HISTORY

In July 1995, the parties contracted for respondent to provide materials and plastering services for $54,000 for the exterior of a new 22,000 square-foot custom home in Beverly Hills. The house was built for speculation, completed in 1997, and initially sold for $10 million. The subcontract provided, inter alia, that changes were not to be performed without a written order signed by appellant that stated the additional cost. The parties later entered into a second subcontract for interior plaster work for $38,630, and a third subcontract for quoins for $44,000.[1] Disputes arose regarding the amounts owed under the three contracts and related change orders.

By letter dated August 6, 1998, respondent's attorney asserted appellant still owed respondent a total of $62,436 for work performed in connection with the three subcontracts.

By letter dated September 4, 1998, appellant's attorney agreed that the basic contract amounts were correct but disputed the amounts claimed in a number of change-order invoices related to each subcontract. Appellant also deducted from respondent's total claim approximately $12,000 it had paid to another plastering contractor. This later work was performed after respondent refused to return to the

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[1] A "quoin" may be defined as "a solid exterior angle" of a building or "one of the members (as a block) forming a quoin and usu[ally] differentiated from the adjoining walls by material, texture, color, size, or projection"; "the keystone or a voussoir of an arch." (Webster's 9th New Collegiate Dict. (1986) p. 968.)

jobsite on the basis that appellant had not paid amounts respondent claimed were due for work already performed. Appellant asserted it owed respondent a total of $18,352.40 on all three subcontracts.

By letter dated November 17, 1998, respondent's attorney demanded a revised total sum of $44,906 on the three subcontracts, which reflected further investigation and analysis, and rejection of the back-charge appellant had paid to the second plastering company.

On January 27, 1999, respondent filed a complaint alleging a first cause of action for breach of contract, a second cause of action for the "agreed price" for work, labor, and materials, and a third cause of action for the "reasonable value" of the work, labor, and materials. Although the complaint expressly refers only to the first subcontract, which was for exterior plastering, respondent alleged under each cause of action and again in the prayer $44,900 in damages, the same total it claimed in its demand letter based on all three subcontracts. The complaint also prays for reasonable attorney fees under the breach of contract cause of action and for costs and "interest at the legal rate from the due date of each invoice until paid" under all causes of action.

On April 29, 1999, appellant answered. Appellant's defenses include the assertion that respondent had failed to properly complete the performance of its obligations "under the written contracts that caused a breach of said contracts" and thereby reduced or eliminated any recovery under the complaint. The answer also realleges and incorporates by reference its cross-complaint.

The cross-complaint asserts causes of action for breach of contract, quantum meruit, negligence, and declaratory relief. With respect to the breach of contract cause of action, the cross-complaint expressly refers to both the first and second subcontracts, for exterior and interior plastering, respectively. The remaining causes of action expressly incorporate these two subcontracts by reference. The cross-complaint prays for a total of $32,560 in damages for the alleged breach of the two subcontracts. In addition, based on an assignment of rights to appellant by the prior owner of the property, the cross-complaint alleges that respondent's stucco work was improperly and poorly

performed, causing, inter alia, water damage and a four-month delay in the sale of the property, resulting in a loss of more than $360,000 to the then owner, an amount for which appellant seeks indemnification from respondent.[2] Appellant also prays for interest from July 1, 1998, until payment, and for reasonable attorney fees under the subcontracts.

On January 24, 2000, appellant filed its first amended cross-complaint, again alleging breach of the subcontracts for exterior and interior plastering and incorporating those allegations into each succeeding cause of action. Appellant changed its prayer for the breach of contract cause of action to request a total of $392,560 in damages.

On March 6, 2000, respondent filed its answer to the cross-complaint.

On or about October 16, 2000, respondent offered to compromise for a payment by appellant of $47,750, each side to bear its own costs and fees.

On Friday, October 27, 2000, with trial scheduled to commence on Tuesday, October 31, 2000, appellant voluntarily dismissed its first amended cross-complaint without prejudice and filed a motion in limine to exclude evidence other than that relating to the first subcontract, for exterior plastering, on the grounds the other evidence was irrelevant and also prejudicial in that it would tend to confuse or mislead the jury.

Respondent opposed the motion, arguing that its complaint must be liberally construed, documentary and testimonial evidence relating to the subcontracts had been the primary subject of the litigation for two years, the amount in dispute was $44,906 based on the three subcontracts and appellant's set-off claims, appellant in response to a request for admissions had admitted the base amount of each of the three subcontracts and the total of the change-orders it had approved for each subcontract, the parties had always framed the case as a dispute over the three contracts and related change orders, appellant had acknowledged the interrelationship of the exterior and interior plastering

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[2] Included in the record is deposition testimony indicating the owner of the property at one point during the litigation claimed as much as $756,000 in damages from water entering the structure.

contracts, appellant had never been misled regarding the evidence to be introduced at trial, appellant would suffer no prejudice from the introduction of the subject evidence, and the subject evidence was relevant to the common count causes of action in respondent's complaint.

At trial on October 31, 2000, the court, noting both sides had waived a jury, denied the motion. It expressed its belief that the entire relationship between the parties ought to be resolved at trial, and it referenced the $44,906 in dispute, an amount based on the three subcontracts.

After completion of trial, the court awarded respondent $37,967.40 on its breach of contract cause of action, $10,401.48 in prejudgment interest, $57,500 for attorney fees, and $3,325.35 as costs. This appeal followed.

DISCUSSION

Damage Award

Appellant contends the court improperly based the damage award on evidence other than that relating to the first subcontract, for exterior plastering, asserting in particular that the second subcontract was never pleaded, the subject evidence was irrelevant to any material issue in the case, and respondent did not move to amend the complaint. Appellant's position is without merit.

Pleadings are to be liberally construed with the goal of substantial justice between the parties. (*Buxbom v. Smith* (1944) 23 Cal.2d 535, 542.) "The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties." (Code Civ. Proc., § 475.) The filed answer may supply omissions from the pleading and, in any event, "the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury." (*Buxbom*, at pp. 542-543.)

In the instant case, the amount of damages requested by respondent in its complaint related to all three subcontracts, as evidenced by the correspondence between the parties' attorneys prior to the filing of the complaint and the admissions of appellant. Furthermore, appellant's answer and its incorporated cross-complaint dealt with all three subcontracts. Finally, appellant could not have suffered any undue prejudice from admission of the subject evidence since it was in possession of this information before respondent filed the complaint. There was no need to amend the complaint and there was no error.

Prejudgment Interest

The court awarded appellant $10,401.48 in prejudgment interest at the rate of 10 percent per annum, from March 12, 1998, through December 12, 2000.[3] Appellant contends that the court erred, asserting that the underlying damages were not certain or capable of being made certain (Civ. Code, § 3287, subd. (a)). Appellant refers to the lengthy dispute between the parties regarding the change orders and various accounting problems, and it argues that only after the court reached judgment were the amounts certain. Appellant cannot prevail on this issue.

A general prayer in the complaint can support an award for prejudgment interest. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 829.) The test is whether appellant knew or could reasonably determine the amount owed. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 960; *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907.) Where the disparity between the amount of damages demanded in the complaint and the amount awarded is not great, there is some assurance that the damages were reasonably calculable. (*Wisper Corp.,* at p. 961.)

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[3] Respondent proposed March 12, 1998, as the earliest date in evidence that it had completed all work required of it pursuant to contract. The court accepted this date.

Here, respondent requested prejudgment interest from the date each invoice became due. Appellant was aware of which invoices were contested since it was the party objecting to paying them, and therefore it could calculate at least the maximum and minimum amount of damages on which interest could be granted. Finally, respondent prayed for $44,900 in damages on its contract cause of action, and that number never varied throughout the litigation. The court awarded less at $37,967.40 and from a date later than many of the invoices. There was no error.

Attorney Fees

Appellant contends the trial court abused its discretion in awarding $57,500 of the $77,535.69 respondent requested in attorney fees. It argues that fees should not have been awarded in connection with the cross-complaint because appellant voluntarily dismissed the pleading and therefore respondent cannot be held to have prevailed and the amount awarded was unreasonable and unsupported by the evidence. We disagree.

Respondent prevailed on its contract cause of action, and pursuant to the language of the three contracts, respondent is entitled to attorney fees for prosecution of the contract cause of action.[4] Because appellant dismissed its cross-complaint without prejudice, respondent is held to have prevailed on that matter (Code Civ. Proc., §§ 1032, subd. (a)(4), 1033.5, subd. (a)(10)), and respondent is entitled to attorney fees related to its defense against the noncontractual causes of action of the cross-complaint (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 617). Respondent's complaint for breach of contract and common counts, and appellant's cross-complaint for breach of contract, quantum meruit, and negligence, which it dismissed two court days before trial, are based on the same

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[4] The relevant contract language, which the parties indicated at oral argument was the same in each of the three contracts, states: "Should any party to this Agreement institute proceedings either by court process, by arbitration, or otherwise on account of alleged failure by the other to perform in accordance with its terms or relating in any other manner to the project described herein, the party against whom judgment or award is rendered by a court of law or arbitration tribunal, shall pay for all costs and attorneys fees incurred by the other in connection with said proceedings."

contracts and related evidence. The work of counsel with respect to prosecuting the contract cause of action of the complaint and defending against the noncontract counts of the cross-complaint during the 20-month period of litigation is inextricably intertwined because all counts arose from the same set of facts. A review of the record discloses ample evidence in support of the trial court's exercise of its discretion in awarding the fees. We find no abuse.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent, and the matter is remanded to the trial court to determine attorney fees on appeal.

NOT FOR PUBLICATION.

_____, J.

DOI TODD

We concur:

_____, P.J.

BOREN

_____, J.

ASHMANN-GERST